Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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NO. 79 - 1818

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BEACON NATIONAL INSURANCE COMPANY AND FIRST PREFERRED INSURANCE COMPANY,

Petitioners

V.

TEXAS STATE BOARD OF INSURANCE AND TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION,

Respondents

* * *

On Petition For Writ of Certiorari To The Court Of Civil Appeals For The Third Supreme Judicial District Of Texas At Austin, Texas

* * *

BRIEF IN OPPOSITION

* * *

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BRIEF IN OPPOSITION

* * *

Respondent Texas State Board of Insurance respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas entered in the above entitled case on May 30, 1979.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas, is reported at 584 S.W.2d 616 and appears as appendix 4 to the petition for writ of certiorari.

JURISDICTION

The formal jurisdictional requisites of the petition and its timely filing would appear to be satisfied although respondent disputes petitioners' contention that any rights guaranteed by the Constitution of the United States have been denied.

QUESTIONS PRESENTED

1. Whether this cause of action presents a substantial federal question?
2. Whether petitioners were entitled to a jury trial in an appeal from an administrative decision of a state agency?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Although petitioners contend that many constitutional provisions are involved, respondent submits that the seventh amendment to the United States Constitution is the only relevant constitutional provision. The seventh amendment of the United States Constitution is appendix 1 herein.

Article 21.49 of the Texas Insurance Code is the only material statutory provision involved, and it is set out as appendix 2 to this brief.

STATEMENT OF THE CASE

The Texas Catastrophe Property Insurance Association was established pursuant to the provisions of the Texas Catastrophe Property Insurance Pool Act, article 21.49, Texas Insurance Code. The purpose of this

Act is "to provide a method whereby adequate windstorm, hail and fire insurance may be obtained in certain designated portions of the State of Texas." Article 21.49, §1, Texas Insurance Code. The Association consists of all property insurers authorized to transact property insurance in Texas. Article 21.49, §4, Texas Insurance Code. Petitioners herein are members of the Association.

In order to effectuate its stated purpose, the Act provides for the appointment of a board of directors of the Association and directs that board of directors to prepare and submit a plan of operation to the Texas State Board of Insurance for approval. Article 21.49, §5(b) and (d), Texas Insurance Code. It is the effect of this plan of operation which has formed the basis of petitioners' complaint.

In July of 1976, petitioners filed an application for hearing before the board of directors of the Texas Catastrophe Property Insurance Association seeking a revision of the plan of operation, rules and regulations for the Association and a revised designation of catastrophe area. The board of directors denied petitioners' request and petitioners appealed this decision to the Texas State Board of Insurance in accordance with Section 9 of the Act. After a full public hearing on the matter on November 19, 1976, the Board concluded that, pursuant to article 21.49, Texas Insurance Code, the Texas Catastrophe Insurance Association was authorized to apply its formula of participation to petitioners. Further, the Board found that the formula for the participation of petitioners had been properly applied by the Texas Catastrophe Property Insurance Association. From this decision by the State Board of Insurance, petitioners appealed to the 53rd Judicial District Court of Travis County, Texas.

In their original and first amended original petitions, petitioners not only sought judicial review of the order of the State Board of Insurance but also challenged the

constitutionality of article 21.49, Texas Insurance Code. The causes of action were severed and tried separately. The administrative appeal was heard and decided first and is the basis of the petition for writ of certiorari now before this Court. Subsequently, the constitutional law issues raised by petitioners were tried under a separate cause number, and that part of the case is now pending before the Court of Civil Appeals for the Third Supreme Judicial District of Texas under cause number 13,096.

Only petitioners' administrative appeal has become final in the Texas courts. In their petition for writ of certiorari, petitioners are prematurely attempting to raise constitutional law issues which have not been finally resolved at the state court level.

ARGUMENT AND AUTHORITIES

I.

PETITIONERS HAVE NOT PRESENTED A SUBSTANTIAL FEDERAL QUESTION

A. The opinion of the court below is based solely upon state grounds.

Despite their attempts to characterize this cause as a constitutional law case, petitioners are actually urging this Court to exercise its jurisdiction to review a state appellate court decision which is based solely upon principles of state law. The federal law questions which petitioners have raised in their petition for writ of certiorari are premature as those issues are pertinent to the cause of action still pending in the court of civil appeals.

A cursory reading of the opinion of the court below discloses that the questions considered and ruled upon by the court were twofold: (1) whether the standard of review of the administrative order should be by trial de novo or by substantial evidence, and, if a substantial evidence review was proper, (2) whether there was

substantial evidence in the record to support the order of the State Board of Insurance. In deciding these issues, the court below relied upon longstanding Texas case law precedent. No questions of federal statutory or constitutional law were before the court, and none were cited as a basis for the court's decision.

In determining the proper standard of judicial review, the court below relied upon the Texas Supreme Court cases of *Texas State Board of Health v. Harrison Clinic Hospital*, 410 S.W.2d 181 (Tex. 1966); *Scott v. Texas State Board of Medical Examiners*, 384 S.W.2d 686 (Tex. 1964); *Chemical Bank and Trust Co. v. Faulkner*, 369 S.W.2d 427 (Tex. 1963); and *Davis v. City of Lubbock*, 160 Tex. 38, 326 S.W.2d 699 (1959). Petitioners had requested the State Board of Insurance to alter the plan of operation of the Texas Catastrophe Property Insurance Association, a change which would affect all members of the state-wide association of insurers. Based upon the above-cited cases, the Court of Civil Appeals reasoned that the relief sought by petitioners required the exercise of the Board's legislative powers and that, therefore, the agency action was not susceptible to a de novo review by the courts. To hold otherwise would violate article II, section 1, of the Texas Constitution, guaranteeing separation of powers in state government. *Key Western Life Insurance Company v. State Board of Insurance*, 163 Tex. 11, 350 S.W.2d 839 (1961).

After considering the administrative record and the briefs and oral arguments of counsel, the court below concluded that there was substantial evidence in the record to support the order of the State Board of Insurance. Again, this decision was grounded solely upon state law.

Contrary to petitioners' assertions, no issues of federal statutory or constitutional law were addressed or decided by the court of civil appeals in the opinion under attack.

B. The constitutional law issues presented by petitioners are still pending in the Texas courts.

As evidenced by the trial court's order of severance, appendix 3, petitioners' challenge to the constitutionality of article 21.49, Texas Insurance Code, was given a new cause number and treated as a separate cause of action. After trial, the district court in that case found article 21.49 to be constitutional. Petitioners appealed this decision to the court of civil appeals.

Subsequent to entry of the judgment upholding the constitutionality of article 21.49, the statute was amended by Acts 1979, 66th leg., p. 1599, ch. 675, §1, eff. Aug. 27, 1979. On appeal, the court of civil appeals found that the amended portion of the statute was intended to alleviate the problems complained of by petitioners. Further, the court found that the record before it did not pertain to the amended statute and that any decision regarding the constitutionality of the prior statute would be advisory only. Therefore, the cause was dismissed for mootness. The opinion of the court of civil appeals in cause number 13,096 is appendix 4 herein. Petitioners have filed a motion for rehearing to the court's opinion. Such a motion is a prerequisite to the filing of an application for writ of error to the Texas Supreme Court. Tex. R. Civ. P. 468. To date, petitioners' motion for rehearing has not been ruled on by the court of civil appeals.

Thus, the constitutional law issues raised by petitioners are currently pending in the Texas courts. This Court has jurisdiction to review state court decisions with respect to issues of federal law only where the state court judgment is final. 28 U.S.C. §1257 (1966); *New York Times v. Jascalevich*, 439 U.S. 1317 (1978). Since the state court judgment on the constitutionality of article 21.49 has not become final, this Court should not exercise jurisdiction over that issue.

In addition, respondent respectfully submits that,

even if the constitutional law questions were properly before this Court, the amendment of article 21.49, Texas Insurance Code, renders the issue of the constitutionality of the prior statute moot. *Kremens v. Bartley*, 431 U.S. 119 (1977); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972).

II.

PETITIONERS ARE NOT ENTITLED TO A JURY TRIAL IN AN APPEAL FROM A STATE ADMINISTRATIVE PROCEEDING.

Under state law, petitioners were not entitled to a jury trial in their appeal from the order of the Texas State Board of Insurance. *Bank of North America v. State Banking Board*, 482 S.W.2d 923 (Tex. Civ. App. -- Austin), *writ ref'd n.r.e. per curiam*, 492 S.W.2d 450 (Tex. 1973); *Martinez v. Texas State Board of Medical Examiners*, 476 S.W.2d 400 (Tex. Civ. App. -- San Antonio 1972, writ ref'd n.r.e.), *appeal dismissed*, 409 U.S. 1020 (1972). Therefore, petitioners urge this Court expand the protection of the fourteenth amendment to the Constitution to include the seventh amendment right to trial by jury in civil cases. Similar opportunities to hold the seventh amendment applicable to the states have been rejected by the federal courts in the past. *Iacaponi v. New Amsterdam Casualty Co.*, 258 F.Supp. 880 (W.D. Pa. 1966), *aff'd*, 379 F.2d 311 (3rd Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968); *Olesen v. Trust Co. of Chicago*, 245 F.2d 522 (7th Cir. 1957), *cert. denied*, 355 U.S. 896 (1957). In this case, such a decision would not benefit petitioners. Even in federal courts, the seventh amendment does not require trial by jury in administrative proceedings where no civil penalties are being assessed. *Atlas Roofing Company v. Occupational Safety and Health Review Commission, et al.*, 430 U.S. 442 (1977); *Curtis v. Loether*, 415 U.S. 189 (1974); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Block v. Hirsh*, 256 U.S. 135 (1921).

This cause does not present circumstances which would justify this Court's expansion of the aegis of the fourteenth amendment to cover the seventh amendment right to a trial by jury in civil cases. Neither state nor federal constitutional law requires a jury trial in an appeal from an administrative decision.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Thomas M. Pollan, Assistant Attorney General of Texas, do hereby certify that three copies of the above and foregoing Brief in Opposition have been deposited in the United States mail, air mail, certified, postage prepaid, on this the _____ day of June, 1980, to each of the following addresses: Mr. Joe E. Shaddock, 318 City National Building, Wichita Falls, Texas 76301, Attorney for Petitioners; and Mrs. Mary Joe Carroll, Clark, Thomas, Winters, & Shapiro, P.O. Box 1148, Austin, Texas 78767, Attorney for the Texas Catastrophe Property Insurance Association.

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Assistant Attorney General

APPENDIX 1

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX 2

Article 21.49, Texas Insurance Code

Catastrophe Property Insurance Pool Act

Declaration and Purpose

Section 1. It is hereby declared by the Legislature that an adequate market for windstorm, hail and fire insurance is necessary to the economic welfare of the State of Texas and that without such insurance the orderly growth and development of the State of Texas would be severely impeded. It is therefore the purpose of this Act to provide a method whereby adequate windstorm, hail and fire insurance may be obtained in certain designated portions of the State of Texas.

Name of Act

Section 2. This Act shall be known as the "Texas Catastrophe Property Insurance Pool Act."

Definitions

Section 3. In this Act, unless the context clearly dictates to the contrary:

(a) "Board" means the State Board of Insurance of the State of Texas.

(b) "Association" means the Texas Catastrophe Property Insurance Association as established pursuant to the provisions of this Act.

(c) "Plan of Operation" means the plan for providing Texas windstorm and hail insurance in a catastrophe area and Texas fire and explosion insurance in an adequate fire insurance area which plan has been approved by the Board for operation by the Association pursuant to the provisions of this Act, which plan may, among other things, provide for limits of liability for each structure insured, and/or the corporeal movable property located therein.

(d) "Texas Windstorm and Hail Insurance" means

deductible insurance against direct loss to insurable property as a result of windstorm or hail as such terms shall be defined and limited in policies and forms approved by the State Board of Insurance.

(e) "Texas Fire and Explosion Insurance" means insurance against direct loss to insurable property as a result of fire and explosion as such terms shall be defined and limited in policies and forms approved by the State Board of Insurance.

(f) "Insurable Property" means immovable property at fixed locations in a catastrophe area or corporeal movable property located therein (as may be designated in the plan of operation) which property is determined by the Association, pursuant to the criteria specified in the plan of operation to be in an insurable condition against windstorm, hail and/or fire and explosion as appropriate, as determined by normal underwriting standards; provided, however, that insofar as windstorm and hail insurance is concerned, any structure located within the seacoast territory as defined by the State Board of Insurance in the General Basis Schedule, commenced on or after the 30th day following the publication of the plan of operation, not built or continuing in compliance with building specifications set forth in the plan of operation shall not be an insurable risk under the terms of this Act. A structure, or an addition thereto, which is constructed in conformity with plans and specifications that comply with the specifications set forth in the plan of operation at the time construction commences shall not be declared ineligible for windstorm and hail insurance as a result of subsequent changes in the building specifications set forth in the plan of operation. When repair of damage to a structure involved replacement of items covered in the building specifications as set forth in the plan of operation, such repairs must be completed in a manner to comply with such specifications for the structure to continue within the definition of Insurable Property for windstorm and hail insurance. Nothing in this Act shall preclude special rating of individual risks

as may be provided in the plan of operation.

(g) "Net Direct Premiums" means gross direct written premiums less return premiums upon canceled contracts (irrespective of reinsurance assumed or ceded) written on property in this State as defined by the Board of Directors of the Association.

(h) "Catastrophe Area" means a city or county in which it may be determined by the Board, after notice of not less than 10 days and a hearing, that windstorm and hail insurance is not reasonably available to a substantial number of owners of insurable property within such city or county, due to such insurable property being located within a city or county subject to unusually frequent and severe damage resulting from windstorm and/or hailstorms. Such designation shall be revoked by the Board if it determines, after notice of not less than 10 days and a hearing, that windstorm and hail insurance in such catastrophe area is no longer reasonably unavailable to a substantial number of owners of insurable property within such designated city or county. If the Association shall determine that windstorm and hail insurance is no longer reasonably unavailable to a substantial number of owners of insurable property in any designated catastrophe area or areas, then the Association may request in writing that the Board revoke the designation of any or all of such catastrophe areas and, after notice of not less than 10 days and a hearing, but within 30 days of such hearing, the Board shall either approve or reject the Association's request and shall, if such request be approved, revoke such designation or designations.

(i) "Inadequate Fire Insurance Area" means a city or county which is, or is within an area, designated as a catastrophe area, as defined in Paragraph (h), above, and in which it may be determined by the Board, after notice of not less than 10 days and a hearing, that fire and explosion insurance is not reasonably available to a substantial number of owners of insurable property within such city or county. Such designation shall be revoked by the Board if it determines, after 10 days'

notice and a hearing, that fire and explosion insurance in such inadequate fire insurance area is no longer reasonably unavilable to a substantial number of owners of insurable property within such designated city or county. If the Association shall determine that fire and explosion insurance is no longer reasonably unavailable to a substantial number of owners of insurable property in any designated inadequate fire insurance area or areas, then the Association may request in writing that the Board revoke the designation of any or all such inadequate fire insurance areas, and, after notice of not less than 10 days and a hearing, but within 30 days of such hearing, the Board shall either approve or reject the Association's request and shall, if such request is approved, revoke such designation or designations.

(j) "Insurance" as hereinafter used in this Act shall mean the types of insurance described in Paragraphs (d) and (e) of this Section 3.

(k) "Insurers" means all property insurers authorized to transact property insurance in this State and specifically includes and makes this Act applicable to county mutual companies, Lloyds and reciprocal or interinsurance exchanges, but shall not include (a) farm mutual insurance companies as authorized in Chapter 16 of this Code; (b) county mutual fire insurance companies which are writing exclusively industrial fire insurance policies as defined in Article 17.02 of this Code; and (c) any companies now operating under Chapters 12 and 13 of Title 78 of the Revised Civil Statutes of Texas, 1925, as amended, which have heretofore been repealed.

Creation of the Texas Catastrophe Property Insurance Association

Sec. 4. (a) The Association which is hereby created shall consist of all property insurers authorized to transact property insurance in this State, except those companies that are prevented by law from writing coverages available through the pool on a Statewide basis.

Every such insurer shall be a member of the Association and shall remain a member of the Association so long as the Association is in existence, as a condition of its authority to transact the business of insurance in this State. Any insurer which ceases to be a member of the Association shall remain liable on contracts of insurance entered into during its membership in the Association to the same extent and effect as if its membership in the Association had not been terminated.

(b) The organizational plan of certain types of insurers precludes such insurers from writing insurance coverage for the State of Texas, any city, political subdivision or agency of the State. When insuring property of the State of Texas, any city, political subdivision or agency of the State, the Association shall not cause such policies to be issued in such companies, nor shall such companies be included as reinsurers for any policies of insurance in this category.

Operation of the Texas Catastrophe Property Insurance Association

Sec. 5. (a) The Association shall, pursuant to the provisions of this Act and the plan of operation, and with respect to insurance on insurable property, have the power on behalf of its members to cause to be issued policies of insurance to applicants, to assume reinsurance from its members, and to cede reinsurance to its members and to purchase reinsurance on behalf of its members.

(b) On or before 10 days after the effective date of this Act the Board shall appoint a temporary board of directors of the Association which shall consist of seven representatives of members of the Association, selected so as to fairly represent various classes of member insurers. Such temporary board of directors shall prepare and submit a plan of operation and shall serve until the permanent board of directors shall take office

in accordance with said plan of operation.

(c) All members of the Association shall participate in its writings, expenses, profits and losses in the proportion that the net direct premiums of such member written in this State during the preceding calendar year bears to the aggregate net direct premiums written in this State by all members of the Association, as furnished to the Association by the Board after review of annual statements, other reports and other statistics the Board shall deem necessary to provide the information herein required and which the Board is hereby authorized and empowered to obtain from any member of the Association, provided, however, that a member shall, in accordance with the plan of operation, be entitled to receive credit for similar insurance voluntarily written in the area designated by the Board and its participation in the writings in the Association shall be reduced in accordance with the provisions of the plan of operation. Each member's participation in the Association shall be determined annually in the same manner as the initial determination. For purposes of determining participation in the Association, two or more members having a common ownership or operating in this State under common management or control shall be treated as if they constituted a single member. Any insurer authorized to write and engaged in writing any insurance, the writing of which required such insurer to be a member of the Association, who becomes authorized to engage in writing such insurance after the effective date of this Act shall become a member of the Association on the 1st day of January immediately following such authorization and the determination of such insurer's participation in the Association shall be made as of the date of such membership in the same manner as for all other members of the Association.

(d) On or before 45 days after the effective date of this Act, the temporary board of directors of the Association

shall submit to the Board for review and approval a proposed plan of operation. Such proposed plan shall set forth the number, qualifications, terms of office, and manner of election of the members of the board of directors and shall provide for the efficient, economical, fair, and nondiscriminatory administration of the Association. Such proposed plan may include a preliminary assessment of all members for initial expenses necessary to the commencement of operation, the establishment of necessary facilities, management of the Association, plan for assessment of members to defray losses and expenses, underwriting standards, procedures for the acceptance and cession of reinsurance, procedures for determining the amount of insurance to be provided to specific risks, time limits and procedures for processing applications for insurance, and for such other provisions as may be deemed necessary by the board of directors and the Board to carry out the purposes of this Act. The proposed plan shall be reviewed by the Board and approved, unless it finds that such plan does not properly fulfill the purposes of this Act. In the review of the proposed plan the Board may, in its discretion, consult with the directors of the Association and may seek any further information which it deems necessary for a decision. If the Board approves the proposed plan, it shall certify such approval to the directors and the plan shall become effective 10 days after such certification. If the Board disapproves all or any part of the proposed plan of operation, it shall return the same to the directors with its written statement setting forth the reasons for the disapproval and any recommendations it may wish to make. The directors may alter the plan in accordance with the recommendations of the Board or shall, within 15 days from the date of disapproval, return a new plan to the Board. In the event the Association has not proposed a plan satisfactory to the Board on or before the 14th day of May, 1971, the Board shall certify and adopt a plan under which the Association shall operate.

The Directors of the Association may, subject to the approval of the Board, amend the plan of operation at any time.

In the absence of an appeal, the Association shall adopt amendments to the plan proposed by the Board within 30 days.

Board Orders

Sec. 5A. (a) After notice and a hearing as provided in Subsection (b) of this section, the Board may issue any orders which it considers necessary to carry out the purposes of this Act including, but not limited to, maximum rates, competitive rates, and policy forms.

(b) Before an order is adopted by the Board, it shall post notice of a hearing on the order at the Secretary of State's office in the State Capitol and shall hold a hearing to consider the proposed order. Any person may appear and testify for or against the adoption of the order.

Eligibility: Application

Sec. 6. (a) Any person having an insurable interest in insurable property located in an area designated by the Board shall be entitled to apply to the Association for insurance provided for under the plan of operation and for an inspection of the property under such rules and regulations, including an inspection fee, if any, as determined by the Board of Directors of the Association and approved by the State Board of Insurance. The term "insurable interest" as used in this subsection shall be deemed to include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage. Application shall be made on behalf of the applicant by a Local Recording Agent and shall be submitted on forms prescribed by the Association. The application shall contain a statement as to whether or not the applicant has or will submit the premium in full from personal

funds, or if not, to whom a balance is or will be due.

(b) If the Association determines that the property is insurable, the Association, upon payment of the premium, shall cause to be issued a policy of insurance as may be provided in the plan for a term of one year.

In the event an agent or some other person, firm, or corporation shall finance the payment of all or a portion of the premium and there is a balance due for the financing of such premium and such balance, or any installment thereof, is not paid within 10 days after the due date, the agent or other person, firm, or corporation to whom such balance is due may request cancellation of the insurance by returning the policy, with proof that the insured was notified of such return, or by requesting the Association to cancel such insurance by notice mailed to the insured and any others shown in the policy as having an insurable interest in the property. Upon completion of cancellation, the Association shall refund the unearned premium, less any minimum retained premium set forth in the plan of operation, to the person, firm, or corporation to whom the unpaid balance is due. In the event an insured requests cancellation of insurance, the Association shall make refund of such unearned premium payable to the insured and the holder of an unpaid balance. The Local Recording Agent, who submitted the application, shall refund the commission on any unearned premium in the same manner.

(c) Any policy issued pursuant to the provisions of this Act may be renewed annually, upon application therefor, so long as the property continues to meet the definition of "insurable property" set forth in Section 3 of this Act.

Deletion of Coverages From Other Policies

Sec. 7. The Board shall prepare endorsements and forms applicable to the standard policies which it has promulgated providing for the deletion of coverages

available through the Association and shall promulgate the applicable reduction of premiums and rates for the use of such endorsements and forms.

Rates, Rating Plans and Rate Rules Applicable

Sec. 8. (a) The Association shall file with the Board every manual of classifications, rules, rates which shall include condition charges, every rating plan, and every modification of any of the foregoing which it proposes to use. Every such filing shall indicate the character and the extent of the coverage contemplated and shall be accompanied by the policies and endorsements forms proposed to be used, which said forms and endorsements may be designed specifically for use by the Association and without regard to other forms filed with, approved by, or promulgated by the Board for use in this State.

(b) For the purpose of making such filing the Association may utilize filings made by licensed rating organizations and it may utilize the loss or expense statistics or recommendations collected and furnished to the Board by an advisory organization authorized under Article 5.73, Insurance Code of Texas.

(c) Any filing made by the Association pursuant hereto shall be submitted to the Board and as soon as reasonably possible after the filing has been made the Board shall, in writing, approve, modify, or disapprove the same; provided that any filing shall be determined approved unless modified or disapproved within 30 days after date of filing.

(d) If at any time the Board finds that a filing so approved no longer meets the requirements of this Act, it may, after a hearing held on not less than 20 days' notice to the Association specifying the matters to be considered at such hearing, issue an order withdrawing its approval thereof. Said order shall specify in what respects the Board finds that such filing no longer meets the requirements of this Act and shall be effective not less than 30 days after its issuance.

(e) All rates shall be made in accordance with the following provisions:

(1) Due consideration shall be given to the past and prospective loss experience within and outside the State of hazards for which insurance is made available through the plan of operation, if any, to expenses of operation including acquisition costs, to a reasonable margin for profit and contingencies, and to all other relevant factors, within and outside the State.

(2) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in such risks on the basis of any or all of the factors mentioned in the preceding paragraph. Such rates may include rules for classification of risks insured hereunder and rate modifications thereof. All such provisions, however, as respects rates, classifications, standards and premiums shall be without prejudice to or prohibition of provision by the Association for consent rates on individual risks if the rate and risk are acceptable to the Association and as is similarly provided for, or as is provided for, in Article 5.26(a), Texas Insurance Code, and this provision or exception on consent rates is irrespective of whether or not any such risk would otherwise be subject to or the subject of a provision of rate classification or eligibility.

(3) Rates shall be reasonable, adequate, not unfairly discriminatory, and nonconfiscatory as to any class of insurer.

(4) Commissions paid to agents shall be reasonable, adequate, not unfairly discriminatory and nonconfiscatory.

(f) For the purpose of this Act the applicant under Section 6(a) hereof shall be considered to have consented to the appropriate rates and classifications authorized by this Act irrespective of any and all other rates or classifications.

(g) All premiums written and losses paid under this Act as appropriate shall be included in applicable classifications for general rate making purposes.

(h) Except as the State Board of Insurance shall determine to be necessary after a hearing thereon, or except as provided in "consent to rate" statutes, any rates established under the provisions of the Insurance Code covering any risks or classes of risks which are located inland of the Intracoastal Canal on the Texas coastline (or inward of the boundary here authorized to be established by the State Board of Insurance amending such Intracoastal Canal boundary), may not be more than the maximum rates set by the Board under Subchapter C, Chapter 5, Texas Insurance Code, for similar risks or classes of risks under the same lines and kinds of insurance. The maximum rates applicable to risks and classes of risks located inland of the Intracoastal Canal on the Texas coastline shall apply also to similar risks and classes of risks located seaward of the Intracoastal Canal if the property is protected by a sea wall constructed by the Corps of Engineers, or if it is determined by the Board that the property or risk is protected by other adequate structure or by any natural physical feature of the terrain that provides protection, and the State Board of Insurance may adjust rates to take into account the degree of such protection.

If valid flood or rising water insurance coverage exists and is maintained on any risk being insured in the pool the State Board of Insurance may provide for a rate and reduction in rate of premium as may be appropriate.

The State Board of Insurance may make provision by rule and regulation requiring catastrophe reserves in respect of the premium received on risks or classes of risks located seaward of the boundary of the Intracoastal Canal and may require catastrophe reserves on risks or classes of risks located inland of the boundary of the Intracoastal Canal and as such boundary may be amended. The amount required to be

reserved for catastrophes (as such catastrophes are defined by the Board)shall be that portion of the pure premium as is actuarially made attributable, as ascertained by the Board, to prospective catastrophic loss. The portion of the pure premium attributable to prospective catastrophic loss shall not be income and shall be unearned until the occurrence of an applicable catastrophe as defined and shall be held in trust by the pool or trustee of the pool until losses are paid therefrom under such reasonable rules and regulations as the State Board of Insurance shall prescribe or approve.

Appeals

Sec. 9. Any person insured pursuant to this Act, or his duly authorized representative, or any affected insurer who may be aggrieved by an act, ruling or decision of the Association, may, within 30 days after such act, ruling or decision, appeal to the Board. In the event the Association is aggrieved by the action of the Board with respect to any ruling, order, or determination of the Board, it may, within 30 days after such action, make a written request to the Board for a hearing thereon. The Board shall hear the Association, or the appeal from an act, ruling or decision of the Association, within 30 days after receipt of such request or appeal and shall give not less than 10 days' written notice of the time and place of hearing to the Association making such request or the person, or his duly authorized representative, appealing from the act, ruling or decision of the Association. Within 30 days after such hearing, the Board shall affirm, reverse or modify its previous action or the act, ruling or decision appealed to the Board. Pending such hearing and decision thereon, the Board may suspend or postpone the effective date of its previous rule or of the act, ruling or decision appealed to the Board. The Association, or the person aggrieved by any order or decision of the Board may thereafter appeal to the District Court of Travis County, Texas, and not elsewhere, in accordance with Article 1.04(f) of the Insurance Code of Texas.

Immunity From Liability

Sec. 10. There shall be no liability on the part of and no cause of action of any nature shall arise against the Board or any of its staff, the Association or its agents or employees, or against any participating insurer or its agents or employees, for any inspections made under the plan of operation or any statements made in good faith by them in any reports or communications concerning risks submitted to the Association, or at any administrative hearings conducted in connection therewith under the provisions of this Act.

Indemnification

Sec. 11. Each person serving as a director of the Association, each member of the Association, and each officer and employee of the Association shall be indemnified by the Association against all costs and expenses actually and necessarily incurred by him or it in connection with the defense of any action, suit, or proceeding in which he or it is made a party by reason of his or its being or having been a director or member of the Association, or an officer or employee of the Association except in relation to matters as to which he or it has been judged in such action, suit or proceeding to be liable by reason of misconduct in the performance of his or its duties as a director of the Association or a member or officer or employee of the Association, provided however, that this indemnification shall in no way indemnify a member of the Association from participating in the writings, expenses, profits, and losses of the Association in the manner set out in this Act. Indemnification hereunder shall not be exclusive of other rights to which such member or officer may be entitled as a matter of law.

Annual Report

Sec. 12. The Association shall file in the office of the Board annually a statement which shall summarize the transactions, conditions, operations and affairs of the

Association during the preceding year at such times and covering such periods as may be designated by the Board. Such statement shall contain such matters and information as are prescribed by the Board and shall be in such form as is required by it.

Effective Date

Sec. 13. This Act shall become effective from and after passage.

Conflicting Laws

Sec. 14. All laws or parts of laws in conflict herewith are hereby repealed to the extent necessary to accomplish the purposes of this Act.

Partial Invalidity

Sec. 15. If any provision of this Act or the application thereof to any person or circumstance is held to be invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Sec. 16. [Emergency provision].

Codification

Sec. 17. This Act is hereby codified as Article 21.49 of the Texas Insurance Code.

Application of Act

Sec. 18. This Act does not apply to farm mutual insurance companies, as defined in Article 16.01 of the Insurance Code, nor does it apply to any existing company chartered under old Chapter 12, Title 78, Revised Civil Statutes of Texas, 1925, repealed by Chapter 40, Acts of the 41st Legislature, 1st Called Session, 1929, Chapter 40.

APPENDIX 3

NO. 260,154

BEACON NATIONAL INSURANCE COMPANY and FIRST PREFERRED INSURANCE COMPANY	§	IN THE 53RD DISTRICT COURT
VS.	§	OF
TEXAS STATE BOARD OF INSURANCE and TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION	§	TRAVIS COUNTY, TEXAS

ORDER OF SEVERANCE

ON THIS 23rd day of August, 1978, came on to be heard the Motion of Severance heretofore filed herein by Defendants and it appearing to the Court that severance is necessary in order to expedite administration of this case:

IT IS THEREFORE ORDERED that Phase I of this suit concerning the administrative appeal of Plaintiffs Beacon National Insurance Company and First Preferred Insurance Company against Defendants Texas State Board of Insurance and Texas Catastrophe Property Insurance Association be severed from Phase II concerning the constitutional question and injunctive relief raised by Plaintiffs, and it is further ordered that the District Clerk shall make copies of all pleadings and file the same under a separate docket number so that Phase II may be administered henceforth as a separate lawsuit.

ENTERED this *19* day of *Sept.*, 1978.

/s/

HARLEY CLARK
Judge Presiding

APPENDIX 4

IN THE COURT OF CIVIL APPEALS,
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

* * *

NO. 13,096

BEACON NATIONAL INSURANCE
COMPANY, ET AL.,
APPELLANTS

vs.

TEXAS STATE BOARD OF
INSURANCE, ET AL.,
APPELLEES

* * *

FROM THE DISTRICT COURT OF
TRAVIS COUNTY, 53RD JUDICIAL DISTRICT
NO. 260,154-A, HONORABLE HARLEY CLARK,
JUDGE PRESIDING

* * *

After exhausting their administrative remedies, appellants, Beacon National Insurance Company and First Preferred Insurance Company, filed suit in district court against appellees, Texas State Board of Insurance and Texas Catastrophe Property Insurance Association, seeking to enjoin appellees from placing new or additional extra-hazardous risk policies with appellants, an entry of an order setting more equitable bases for voluntary writings and extra-hazardous risk insurance, and, alternatively, a declaration that Tex. Ins. Code Ann. art. 21.49 (Supp. 1979)(the "Catastrophe Property Insurance Pool Act"), was unconstitutional. Before trial, the district court severed the constitutional cause of action from the administrative appeal. The

administrative appeal proceeded to trial and was reviewed by this Court in Beacon National Insurance Company v. Texas State Board of Insurance, 582 S.W.2d 616 (Tex.Civ.App.--Austin 1979, no writ). After trial to the court on the issue of constitutionality, judgment was entered that Article 21.49 and the plan of operation of the Texas Catastrophe Property Insurance Association are constitutional and that all relief sought by appellants should be denied. Appellants have again perfected their appeal to this Court.

Appellants attack the constitutionality of Article 21.49 and the plan of operation of the Texas Catastrophe Property Insurance Association (known as the "Cat Pool") alleging that, by their operation, they abridge appellants' rights to due process and equal protection of law as guaranteed by the Constitutions of the United States and the State of Texas.

Appellants contend that Article 21.49 violates their right to equal protection of law by giving the larger insurance companies the competitive advantage of being able to write themselves out of Cat Pool participation and forcing the smaller companies, such as Beacon and First Preferred, to write the bulk of their policies in less desirable areas of the designated catastrophe zone. Many of the large companies have a very small percentage of participation in the Cat Pool as compared to that of the smaller companies. Appellants argue that this is due largely to the fact that the large insurers can obtain credit against Pool participation based on their voluntary writings in the catastrophe area and that, because of their size, they are able to pick and choose their risks. Furthermore, appellants assert that the smaller insurance companies are not able to write insurance voluntarily in the catastrophe area because of both a limitation in the number of agencies available to them and the refusal of lenders to accept policies from them.

Appellants also contend that Article 21.49 violates

their right to due process of law by forcing them to concentrate their coverage in certain limited areas so that, if a major catastrophe should hit one of those areas, appellants would possibly be subjected to such major losses as to amount to a taking of their property without compensation and which losses might impair their ability to meet their contractual obligations to their policyholders. Appellants point out that the Association has permitted concentration of more than 60% of the Pool in Galveston and Brazoria Counties. They predicate their suit on the issue of whether they would suffer unconstitutionally heavy financial losses should a major $800 million hurricane strike one of these counties where they have a concentration of windstorm coverage.

We have some question as to whether appellants have established a justiciable interest sufficient to maintain this suit for declaratory judgment. California Products, Inc. v. Puretex Lemon Juice, Inc., 160 Tex. 586, 334 S.W.2d 780 (1960). A court will not declare rights on facts that are uncertain, contingent and which facts or events may never happen. Laborers' International Union of North America, Construction & Municipal Workers Local Union No. 1253 v. Blackwell, 482 S.W.2d 327 (Tex.Civ.App.--Amarillo 1972, no writ). Likewise, the mere fact that petitioners will sustain financial loss by reason of lawful competition is not sufficient to give them a justiciable interest. Alabama Power Company v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1937); West Texas Utilities Co. v. Smith, 168 S.W.2d 665 (Tex.Civ.App.--Austin 1943, writ ref'd).

However, assuming, *arguendo*, that appellants do have sufficient justiciable interest to allow them to maintain this suit, we feel that same must now be dismissed as moot.

Subsequent to entry of judgment upholding its constitutionality, Article 21.49 was amended by Acts 1979, 66th Leg., p. 1599, ch. 675, §l, eff. Aug. 27, 1979:

> "Sec. 19. In the event any occurrence or series of occurrences within the defined catastrophe area results in insured losses of the association totaling in excess of $100 million within a single calendar year, the proportion of the total loss allocable to each insurer shall be determined in the same manner as its participation in the association has been determined for the year under Subsection (c) of Section 5 of the Texas Catastrophe Insurance Pool Act, as amended, and any insurer which has paid its share of total losses exceeding $100 million in a calendar year shall be entitled to credit the amount of that excess share against its premium tax under Article 7064, Revised Civil Statutes of Texas, 1925, as amended. The tax credit authorized shall be allowed at a rate not to exceed 20 percent per year for five or more successive years following the year of payment of the claims. The balance of payments paid by the insurer and not claimed as such tax credit may be reflected in the books and records of the insurer as an admitted asset of the insurer for all purposes, including exhibition in annual statements pursuant to Article 6.12 of this Insurance Code."

Section 19 recognized the problem that a large catastrophe might visit on the smaller insurers and sought to deal with the problem by allowing losses in excess of $100 million to be credited against the insurer's premium tax. Clearly, this section was intended to alleviate the problem of which appellants complain in this suit.

In Clymore Co. v. Railroad Commission of Texas, 86 S.W.2d 797 (Tex.Civ.App.--Austin 1935, no writ), appeal was taken from an order of the trial court enjoining the Railroad Commission from producing gas from certain wells in Refugio County. The injunction was heard and determined under the authority of

Article 6008. Subsequent to entry of the order that was basis of appeal, Article 6008 was amended by adding Chapter 120. The Court held:

> "It is quite manifest that chapter 120 has... prescirbed definitions, standards, and criteria which in many respects are essentially different from those prescribed or involved in the 1933 amendment. Whether these differences call for a different holding in the instant appeal depends both upon a proper construction of chapter 120 and factual issues applying such construction to the wells in question. We cannot in this proceeding, upon the record made in a hearing involving only the 1933 amendment, determine the issues; but are confined to the issues presented by the record as applied to the 1933 amendment. That amendment having been superseded by chapter 120, and the temporary injunction being predicated upon the violation of the 1933 amendment, the case, as presented in this appeal, has become moot."

See also: Freeman v. Burrows, 141 Tex. 318, 171 S.W.2d 863 (1943); Danciger Oil & Refining Co. of Texas v. Railroad Commission of Texas, 122 Tex. 243, 56 S.W.2d 1075 (1933); Saunders v. Southwest General Insurance Company, 304 S.W.2d 406 (Tex.Civ.App.--Austin 1957, writ ref'd n.r.e.).

The addition of Section 19 to Article 21.49 materially qualifies the liability that each insurer must bear under the Act. One of appellants' major contentions is that, in the event of an $800 million hurricane, they would possibly be forced into receivership because their share of the loss would be so great. Should such a storm happen, Section 19 would come into play and would have a direct affect on appellants' liability under the Act; any losses over $100 million would be credited against their premium tax over a period of years.

We do not hold that Article 21.49 is or is not constitutional; likewise, we do not hold that, if it were unconstitutional, the addition of Section 19 would make it constitutional. These questions depend on a construction of Article 21.49 as it now exists along with all attendant factual issues. As the record in this proceeding deals only with pre-amendment Article 21.49, that construction and those factual issues are not properly before us. Clymore Co. v. Railroad Commission of Texas, *supra.*

As this suit determined the constitutionality of a statute that has, in the interim, been materially amended by the Legislature, and that amended statute is not properly before us, any judgment rendered by this Court on the merits would violate the constitutional prohibition against advisory opinions and would not be determinative of any existing controversy. Firemen's Insurance Company of Newark, New Jersey v. Burch, 442 S.W.2d 331 (Tex. 1968).

A case becomes moot when it appears that one seeks judgment upon some matter which, when rendered, cannot have any practical legal effect upon a then existing controversy. McNeill v. Hubert, 119 Tex. 18, 23 S.W.2d 331 (1930).

This appeal being now moot, the judgment of the district court is reversed, and the cause is hereby dismissed. Freeman v. Burrows, *supra.*

Robert O. Smith,
Associate Justice

Reversed and Dismissed

Filed: April 23, 1980